91-378

CASE NO.: -

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

J. HAROLD KADLEC

Petitioner

versus

DEPARTMENT OF THE ARMY

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI

J. Harold Kadlec
1035 Asbury Ave.,
Evanston, IL 60202
(708) 869-5497

53

QUESTIONS PRESENTED FOR REVIEW

1. If the employee can show that the Agency knew that the reason(s) for their personnel actions could not be substantiated, at what point do these Agency induced personnel actions and improperly applied administrative procedures constitute unjustified coercion and duress.

2. At what point does a resignation which is; asserted, suggested, discussed with or is otherwise prompted by Agency personnel, constitute an involuntary personnel action, which is tandamount to a forced involuntary resignation.

3. At what point do the unjustified circumstances of the Agency's actions and statements, which are involuntarily accepted by the employee for lack of alternative, affect the employment circumstances.

LIST OF ALL PARTIES TO THE PRECEEDING

All parties to the proceeding are identified in the caption.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

REFERENCE TO OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS

J. Harold Kadlec v. Department of the Army, Merit Systems Protection Board, Washington Regional Office, Docket Number DC07529010412, Initial Decision, dated August 6, 1990.

J. Harold Kadlec v. Department of the Army, Merit Systems Protection Board, Washington Regional Office, Docket Number DC07529010412, Final Order, dated December 12, 1990.

J. Harold Kadlec v. Department of the Army, United States Court of Appeals for the Federal Circuit, Case Number 91 3140, Decided June 12, 1991.

J. Harold Kadlec v. Department of the Army, United States Court of Appeals for the Federal Circuit, Case Number 91 3140, Judgement Affirmed, dated June 12, 1991.

STATEMENT OF JURISDICTION:

The judgment, which is the subject of this petition, was entered by the United States Court of Appeals for the Federal Circuit on June 12, 1991. Accordingly, pursuant to 28 U.S.C. para 2101(c) and United States Supreme Court Rule 13.1, the deadline for filing this petition for writ of certiorari

is September 10, 1991. Jurisdiction is conferred upon the Court pursuant to 28 U.S.C. 1254(1).

STATEMENT OF THE CASE:

There is precedent in the law whereby if an employee can show that the Agency knew the threatening personnel actions could not be substantiated, the threatened actions by the Agency are purely coercive. See Dabney v. U.S. 358 F.2d 533 (1965) and Paroczay v. Hodges 297 F.2d 439 (D.C. Cir.1961).

The Agency induced personnel actions involved in and the consequences resulting from the performance period July 6, 1987 to June 30, 1988, as well as the resulting July 11, 1988 Unsatisfactory performance rating were unwarranted. It was only after these personnel actions had been officially enacted and recorded, to be unjustly used again as applied duress, that they

were vitiated or invalidated by the Agency Commander's letter, dated July 21, 1988, wherein he stated: "...it appears that correct regulatory procedures were not followed. (Management Employee Relations (MER) will contact your Reviewer) and provide guidance on correct procedures to be followed". As a direct consequence of this Agency acknowledgment, all Agency induced personnel actions perpetrated from July 6, 1987 through July 11, 1988 could not be substantiated and therefore were purely coercive.

The subsequent Agency induced personnel actions involved in and the consequences resulting from the reapplication of that same July 11, 1988 Unsatisfactory performance rating include: the July 28, 1988 Reviewer issued Memorandum: Notice of Opportunity to Improve Unacceptable Performance; the

August 26, 1988 issuance of a new set of performance standards; a 120 Day Probationary Period from August 26, 1988 to December 24, 1988; a Minimally Acceptable Performance rating issued by my Rater on January 17, 1989; the qualified upgrade of that rating to Fully Successful on May 30, 1989; the withholding of my within grade step increase; as well as a subsequently issued (post employment) and allegedly unsatisfactory performance rating that was backdated to May 30, 1989. It was only after these personnel actions had been officially enacted and recorded, to be unjustly used as applied duress, that they were vitiated or invalidated by the Chief, MER in her letter dated June 8, 1989, paragraph 2d, wherein she states referring all above listed work performed under the provisions of performance standards issued August 26,

1988: "As a result of this review it was determined that the performance plan needed to be revised to make it clear and measurable". Therefore it can be directly concluded that all personnel actions recorded under the provisions of the August 26, 1988 performance standards are vitiated, because they were declared unsubstantiated by management's failure to adequately define the requirements of performance clarity, ie: what duties are required of the employee and standards of measurement, ie: how well the employee must perform to meet various performance levels. Consequently, my performance and the co-generated personnel actions resulting from alleged or perceived performance could not be substantiated by the Agency during the period August 26, 1988 through May 30, 1989. As a result, all inclusive personnel actions

were coercive.

Inasmuch as I was under a new third set of performance standards from May 31, 1989 to my resignation on August 26, 1989, a period of less then ninety days with new standards, any applied performance action would be invalidated by regulation and therefore vitiated. The Agency Civilian Personnel Officer (CPO), however, continued to induce personnel actions during this period and until well after my formal resignation which included the unjustified withholding of my within grade step increase. My attempts to have that step increase issued resulted in the Agency CPO notifying me on October 16, 1989, some two months after I had formally resigned, that I had been denied a within grade step increase and until then unknowingly been issued an unsatisfactory performance rating. That

same October 16, 1989 CPO letter stated: "Regulations provide administrative channels for an employee to request redetermination of withholding within grade increases, however, since you are no longer a Department of the Army employee, these administrative avenues are not available to you".

My grieving the withholding of my within grade step increase resulted in the Agency's deceptive co-issuance of an unsatisfactory performance rating. I was subsequently informed by the Command's Office of the Inspector General's (IG), U.S. Army Intelligence and Security Command, in a December 20, 1989 response letter that an "unsatisfactory rating" had in fact been "prepared" by my supervisor, then "signed effective" the last day of my employment on August 25, 1989, and then backdated to May 30, 1989. As a consequence, its' alleged

effectiveness fell well within my employment. In fact my resignation, submitted July 18, 1989, was in the middle of the time frame when the rating was allegedly prepared on August 25, 1989 and then backdated to be effective on May 30, 1989.

It is just such coercively induced false and fabricated personnel actions that produced this situation in the first place, for which I now seek vindication. A number of additional grievable issues remain, as were documented by the Department of the Army (DA) IG, in his response letter dated May 1, 1990. Additionally, any government agency with which I seek employment or which contacts my previous employer for a reference will be told that my work performance prior to departure was unsatisfactory. I believe this has already happened at least once

during the last two years that I have been actively seeking government employment, precluding me from keeping my civil service career of sixteen years.

In yet another post employment action, both the Agency and the IG have assured me in writing that the necessary personnel action paperwork has been submitted to cancel my Mail Handler's Medical Benefit Plan (MHBP) coverage, so that I can settle pending claim submissions. This has not been done.

There is sufficient precedent for concluding that a resignation which is asserted, suggested, discussed with, or otherwise prompted by any agency personnel is involuntary and tandamount to a discharge. See Dumas v. M.S.P.B. 789 F.2d 892, 894 (Fed.Cir 1986), and Perlman v. U.S. 490 F.2d 928, 932-33, 208 Ct.Cl. 397, 406-08 (1974).

In my newly assigned Rater's Memorandum, Subject: Interim Review of Work/Job Performance, dated October 5, 1988, in paragraph 4, Recommendation, my Rater writes: "It is my professional judgment that the USILO (United States Intelligence Liaison Officer) or the position in which you are in is not an area that you should pursue. I believe that you should seek a different career field, one perhaps in which you would deal with people but not one which involves intelligence collection and reporting".

In a June 8, 1989 Memorandum from the Deputy to the Commander for Career Programs, paragraph 3, Mr. Smith writes: "If the MICECP (Military Intelligence Civilian Excepted Career Program) is not able to satisfy your personal needs, you may wish to consider seeking employment opportunities outside the MICECP".

Clearly, the Board and Circuit Court erred in its' concluding opinion by accepting unsubstantiated personnel actions as facts and inferring conclusions which were clearly and convincingly inconsistent with the presence of coercion and statements that were tandamount to a discharge. The coercive circumstances generated by the Agency were involuntarily accepted by me for lack of alternative and constitute the duress inherent in:

- improper and untimely application of established personnel procedures, regulations or requirements;

- unsubstantiated performance and rating documentation, improperly authorized or implemented;

- or unfair, unjust, unreasonable, untimely and dishonest implementation of personnel actions.

The following support information will

center on the harassment and duress induced by the Agency issuance of: four performance ratings, three sets of performance standards and numerous co-generated personnel actions, implemented without warrant, substantiation or justification. Agency induced coercion has been documented. But it must be remembered that this was done only after these actions had been deceptively recorded and used to perpetrate incidents of duress, coercion, deception, time pressure, intimidation and misinformation, for a period of time lasting more then a year. See Leone v. U.S. 204 Ct.Cl. 334, 339 (1974), and McGueken v. U.S. 407 F.2d 1349, 189 Ct.Cl. 284 (1969).

On July 11, 1988, I was issued the first of four performance ratings that I would be issued during the following year. My Rater by designating the

Summary Rating Level, with an Unsatisfactory, issued an official performance rating and not a Non-Adjectival performance appraisal or level of competence. My Rater did not document my alleged unsatisfactory performance. This is important because according to regulation, the unequivical consequence of a substantiated and well documented unsatisfactory performance is dismissal from government service. My performance has never been documented at less than Fully Successful. I was not willing to accept an unwarranted, unsubstantiated or unjustified rating at this or any point in my civil service career. Nor should I have had to experience and accept the harassment resulting from this unwarranted rating action. Inasmuch as my Rater was reassigned immediately prior to my receipt of the rating, I was given the

rating by my Reviewer, who refused to discuss either the rating or the basis for the rating with me, other than to say that the Rater, he (the Reviewer) and the Endorser had signed and finalized the rating, which would not be changed. By this action my Reviewer strongly asserted that I should be involuntarily discharged. If left uncontested, my Reviewer's action would have spoken louder than words and his unwarranted personnel action would have not only prompted but resulted in my dismissal from government service. Because of the undocumented unsatisfactory performance allegation as well as the after the fact improper notification and handling of the performance action, the Agency's actions were comprised of duress, misinformation and time pressure for me the employee, and the deceptive Agency personnel

action of coercion to force me to accept an unjustified course of action.

In a letter dated July 13, 1988, I grieved the unsatisfactory rating with my employing Agency Commander. On July 21, 1988, the Agency Commander responded by acknowledging that the rating action was unjustly instituted. He stated: "...it appears that correct regulatory procedures were not followed. (Management Employee Relations (MER)) will contact (my Reviewer) and provide guidance on correct procedures to be followed. If you have any further questions concerning the performance appraisal process, please to do not hesitate to contact Mrs. McNeil (MER) for advice or guidance. She can be reached at (unsecure) Autovon 923-3916/4538."

Inasmuch as I was assigned to West Berlin, Germany and my employing Agency

MER office was at Fort Meade, MD, handling personnel actions through correspondence was routinely untimely requiring thirty days, and difficult to satisfactorily implement through correspondence. The fact that in this instance I received no Agency written response to any of my inquiries for assistance, guidance or information from July 1988 to June 1989 significantly contributed to my hardship by narrowly confining my understanding of ongoing personnel actions and alternative courses of response to only those induced by my immediate rating chain, which I have documented as consisting of duress. In accordance with the directions contained in the July 21, 1988 Agency Commander's letter, on numerous occasions, I telephonically contacted the MER office, only to be told to submit the request for

information in a letter. I have submitted a number of photocopied certified postal receipts to document my submissions. Additionally, my Reviewer verbally directed me never to work through the local Civilian Personnel Division in Berlin, but to only go through my employing Agency personnel office at Fort Meade, MD, as only the Agency was familiar with my situation.

A few days after my receipt of the Agency Commander's response, my Reviewer in his July 28, 1988 Memorandum: Subject: Notice of Opportunity to Improve Unacceptable Performance issued a regurgitated narrative consisting almost verbatim of the issues fabricated in the July 11, 1988 Unsatisfactory performance rating. It is one thing for a personnel action to be mismanaged one time and then to be dismissed in a grieved personnel action. But the

unwarranted and deceptive reissuance of the same dismissed issues of misinformation for a second time is coercive in intent and constitutes duress and intimidation for and of the employee. There was no indication in the Reviewer's Memorandum that the Agency Commander had provided my rating chain with guidance on correct procedures to be followed, as was promised. Nor was there any indication that the local rating chain was following correct procedure in their continuing application of my personnel actions.

My rebuttal, dated August 10, 1988, to the Reviewer's Memorandum was ignored by everyone in the chain of command, from Reviewer to Agency Commander. At the time, I was willing to continue working with and within my employing agency. However, I was not willing to

accept or to let the reapplication of unsubstantiated performance allegations remain a matter of record, especially for the second time. Issuance of the Reviewer's Memorandum meant the intent of the unsatisfactory performance rating was again being deceptively and coercively reimposed as an officially documented personnel action.

The Reviewer's Memorandum document's the basis for the Agency's unwarranted implementation of 120 days of time pressure and intimidation of my performance. This can be seen documented in the Reviewer's reimposition of the unwarranted adverse nature of the July 11, 1988 rating action as well as his Memorandum wherein the Reviewer states his personal subjective standards of: "the expectation of highest standards, requiring extraordinary commitment". These subjective performance standards

are absolutes, not a reasonable, fair or just management expectations. These are intimidating and coercive words, full of duress from a supervisor. Through implementation by my new Rater of the Reviewer's Memorandum, the coercive and ill intended misinformation of the unwarranted unsatisfactory rating was being recorded and established as official performance documentation, without any reference to the previously documented fabricated basis.

As a direct result of the Reviewer's Memorandum I was placed under the time pressure provisions of a 120 Day Probationary Period (August 26 to December 24, 1988). Since it had already been established by the Agency Commander, in his July 21, 1988 letter, that there was no basis for alleged deficiencies in my performance, it should have been summarily concluded

that there was consequently no basis for initiating a 120 Day Probationary Period. That should have resolved the situation whereby the rating should have been discarded. Instead, my Reviewer verbally informed me that if I did not complete, and successfully complete, any of the 120 Day Probationary Period the July 11, 1988 Unsatisfactory performance rating would be made the official rating of record. Again, I was being coerced by unsubstantiated personnel actions and duress to accept a personnel situation that unjustly characterized me as an unsatisfactory performer. I received no Agency MER response to any of these induced personnel actions.

During the 120 Day Probationary Period, a continuing series of personnel actions were documented. A new second set of performance standards were issued by a new Rater. Standards were applied

which were neither signed nor dated. It should be remembered that this Probationary Period is premised on unwarranted incidents, which were previously documented to be unsubstantiated. The purpose of a Probationary Period is to determine what was wrong with the employee's performance from the documented unsatisfactory rating and to correct those deficiencies during the 120 Day Probationary Period. Further, the validity of my alleged unsatisfactory performance during the previous year could not be confirmed by changing the performance standards in mid-stream before the Probationary Period could either confirm or deny my performance under the previous set of standards. It is regulation for an employee to be given 90 to 120 days to work with the new performance standards before being

rated under the new performance criteria. This too, was not being done.

Additionally, my newly assigned Rater issued three Memoranda, the last two of which were improperly issued to me after the close of the 120 Day Performance Period, apparently because he did not realize that weekends and holidays are included in the 120 day period, which consequently forced him to backdate the last two Memoranda, and deceptively issue both of them as late as eight weeks after the close of the Probationary Period. In my new Rater's first Memorandum, dated October 5, 1988, issued only some five weeks or a quarter of the way into the Probationary Period, he wrote in his Recommendation paragraph: "It is my professional judgment that the USILO (United States Intelligence Liaison Officer) or the position in which you are in is not an

area that you should pursue. I believe that you should seek a different career field, one perhaps in which you would deal with people but not one in which involves intelligence collection and reporting". This biased and unjustified statement is consistent with my former Rater's and the Reviewers previously conveyed assertions and their display of coercive attitudes, actions and intentions in issuing the July 11, 1988 rating. These were the first of many continuing clear and convincing indications of management's decided intent to assert, suggest, discuss or otherwise prompt my involuntary discharge.

During the 120 Day Probationary Period, I was never critiqued or counseled, either verbally or in writing, concerning any unsatisfactory performance. I was never informed,

either verbally or in writing, that I had "Not Met" a performance element. Without documented deficiencies, the Agency deceptively instituted 120 days of coercive duress, to include; time pressure, intimidation and harassment.

As a consequence of the 120 Day Probationary Period, on January 17, 1989, my Rater issued my second performance rating. This time the rating for Part VI Summary Rating Level was Minimally Acceptable for the 120 Day Probationary Period. I was issued a less than Fully Successful rating because in the non-critical element of Security Practices my Rater issued me a Not-Met element rating for specifically making long distance telephone calls, of a personal nature according to the narrative contained in Part II, Element Rating Explanation. Except for personal telephone calls to immediate family

members and two former close supervisors, the only other person I routinely telephoned was the Agency MER officer, as I had been directed by the Agency Commander in his July 21, 1988 response. More importantly, I never telephoned long distance from the office. Instead I always used my personal telephone at home. If in my Rater's reference to long distance telephone calls of a personal nature he was listening to my conversations, he should have substantiated his claim or else he was referring to illegally evesdropping on my personal and private conversations.

Without substantiating documentation and proper procedure being followed on the part of my Agency, I was not willing to accept a Marginal rating anymore than I was willing to accept an unwarranted unsatisfactory rating. Additionally, in

Part V, Comments, my supervisor attributed my alleged improvement to: "increased effort was based on his fear of removal from civil se vice". If this coercive assertion was my Rater's documented impression of what transpired and motivated me during the 120 Day Probationary Period then that is what harassing Agency management assistance, guidance and direction amounted to, especially since there was no documented correction of or substantiation for any alleged performance less than Fully Successful. My Rater never documented that I had "Not Met" a performance element, yet he issued me a Not Met element, which was sufficient for him to issue me a marginally acceptable annual performance rating. My personnel situation had already consisted of five months of unwarranted personnel actions, and now this rating action would prolong

the coercion and duress.

My Endorser's cover letter to the rating concluded: "It is my view that although the overall rating of Minimally Acceptable may be sufficient for his retention in the MICECP (Military Intelligence Civilian Excepted Career Program), I do not judge it as sufficient to continue his assignment to this command". If the Endorser's assertion is justified, and I am not "sufficient" for assignment to the Berlin Command, then why should I be retained in government employment. But if the Endorser's suggestion is unwarranted, unsubstantiated or unjustified, and the rating is grieved and upgraded as was done, then his recommendation constitutes duress and coercion and otherwise prompts and encourages my involuntary discharge with respect to my continued employment

within both that Command as well as my employing Agency.

I was first informed of and provided the Minimally Acceptable rating on March 7, 1989, some ten weeks after the close of the rated period. Again, I grieved the rating to the Agency Commander in a Memorandum dated March 17, 1989. On May 30, 1989 the Agency Commander, for a second time, acknowledged that the rating action was unjustly instituted, when he responded, vitiating the personnel actions which comprised the January 17, 1989 Minimally Acceptable rating: "Your requested relief is granted regarding the rating of the element pertaining to Security Practices because the rating official did not cite any instance wherein you failed to meet the standard. ...all elements have been met and therefore constitute a summary rating of "Fully

Successful"".

The Agency Commander then deceptively continues in his response letter saying: "It should be noted that the relief granted herein is based upon technical aspects of the appraisal procedures and should not be viewed as my approval or concurrence with your actual performance. Review...indicates a decided dissatisfaction by management with your performance". The Agency Commander's upgrade of the performance determination to Fully Successful is an acceptable level of performance in any government office. However, after some eleven months of documented Agency induced coercion, duress and harassment, the Commander's comments prompts and casts a continuing doubt and question on my rated Fully Successful performance. Since the Agency Commander's statement: of management's decided dissatisfaction,

was unwarranted, unsubstantiated and unjustified, his remark equates my alleged unsatisfactory performance with management's decided dissatisfaction. Without substantiation; the Agency Commander's comment above, my Endorser's statement that I am not "sufficient" for retention and the continuing actions and statements of the Rater's professional judgment and Reviewer's discharge assertion, management clearly prompts and encourages my involuntary discharge.

After a year of documented precedent without any acknowledgment, correction or alternative but more of the same harassing treatment, I was coerced into accepting the fact that I would not receive full, fair and just treatment. In and of itself this was not acceptable resolution for the numerous incidents of unwarranted, unsubstantiated and unjustified

personnel actions perpetrated against me, or for the assertions, suggestions, discussions or prompting from all levels of Agency personnel to find another career field or other employment opportunities. Nor was there any justification for the Agency induced actions to continue to happen.

The basis for much of this Agency induced deception, duress and coercion is found in issuing the August 26, 1988, set of performance standards. According to a letter, dated June 8, 1989, paragraph 2d, from MER, my previous performance standards, which were effective from August 26, 1988 through May 30, 1989, were reviewed and reissued on May 31, 1989 because: "it was determined that the performance plan needed to be revised to make it clear and measurable". This documented statement is an Agency determination and

conclusion. It says, in effect, that two fundamental performance criteria: clarity and measurement were not inherent in the standards applied during the period August 26, 1988 through May 30, 1989. Having already referenced established precedent that unsubstantiated personnel actions constitute coercion, the resulting implementation of these Agency induced actions constituted duress. These were the same standards that were improperly used; in establishing and implementing the 120 Day Probationary Period, my January 17, 1989 Minimally Acceptable rating, the May 30, 1989 Agency Commander's upgrade to Fully Successful, and the after the fact issuance of an unsatisfactory rating backdated to May 30, 1989, as well as numerous other co-generated personnel actions. In effect, the Agency MER Officer formally

acknowledged that there was no basis for substantiating Agency induced personnel actions instituted between August 26, 1988 and May 30, 1989, making the actions purely coercive, and the resulting consequences of implemented personnel actions one of duress.

On May 31, 1989, a new third set of performance standards were issued for the year. Inasmuch as I resigned on August 26, 1989, I was under the provisions of these standards for less then ninety days, thus precluding any rating application. Additionally, my Rater in his June 30, 1989 Memorandum, Subject: Presentation and Discussion of New Job Performance Work Plan, documented his use of applied physical duress. During the session I became visibly physically ill, as a direct result of the duress. I broke out in a noticeable cold sweat, turned flush in

color and experienced shortness of breath. I informed my Rater that I felt ill and asked to be excused. In his Memorandum, my Rater acknowledges that he refused to excuse me. He continued the discussion without any intent of acknowledging or responding to my repeated comments that I continued to feel ill and was physically distressed and unable to continue with the discussion. It was only after my Rater had completed his dissertation and I had signed the standards, that he agreed to release me from the session. This is the same Rater who noted in the January 17, 1989 Minimally Acceptable rating, Part V, Comments, that "fear" had improved my performance.

During the course of the previous year, I had repeatedly proposed a viable alternative and requested reassignment five times. The April 1989 request

resulted in Agency orders being issued and welcoming letters received, only to be rescinded in May 1989. All the other four requests were rejected. The most recent Agency reassignment response and resignation suggestion was contained in a June 8, 1989 letter, Subject: Request for Reassignment, from the Deputy for Career Programs, who denied my request for reassignment and instead in paragraph three stated: "If the MICECP (Military Intelligence Civilian Excepted Career Program) is not able to satisfy your personal needs you may wish to consider seeking employment opportunities outside the MICECP". It was not a matter of personal needs that premised my reassignment request(s), but fair, just, reasonable, timely and honest treatment. It was clearly apparent to me that I would continue to be treated unjustly with incidents of

unwarranted, unsubstantiated and unjustified time pressure, intimidation and continued deception, duress and coercion if I remained. His assertion to consider employment opportunities outside of the Agency was a clearly conveyed reflection of senior management's position with regard to my continued employment with and within the Agency, and senior managements express desire for my induced involuntary resignation.

The impact of these Agency induced personnel actions exerted a strain on me; emotionally, mentally and physically. As a prior Case Officer for five years I was prepared for the mental and physical stress required by the duties. But I was not prepared for these Agency induced actions. Their long duration and intensity without resolution presented such an unjustified

degree of urgency and pressure as to deform my physical well being. My referral to the US Army Hospital, Berlin, Internal Medicine Department for treatment of established hypertension or high blood pressure was documented in a summary of treatment hospital Memorandum, dated June 28, 1989. Through medical visits as well as extensive testing conducted in February 1988, I am able to document that my hypertension was established during the same time frame as these Agency induced actions. My continuing hypertension is chronic. Medicine and treatment will be life long under the direction of a medical doctor. I attribute this chronic medical ailment and the resulting consequences directly to Agency induced actions.

In yet another series of personnel actions starting as far back as January 12, 1989, I was supposed to be notified

of any performance deficiency that would have precluded me from receiving my within grade step increase. This would allow a two month period of time to correct any allegedly deficient performance element, so that the step increase could be issued as scheduled, in my case on March 12, 1989. I was not notified of either a deficiency or that the step increase had been delayed, or withheld, until a May 4, 1989 session with my Reviewer, wherein he issued a Memorandum, Subject: Decision to Delay Within Grade Increase, for me to sign. After I was informed by the Reviewer of the "Withholding" of my within grade step increase, allegedly because I failed to meet the non-critical performance element security practices, I replied that I wanted to discuss the issue with MER before signing. At this point I was explicitly directed by the

Reviewer "not to telephonically contact anyone at Fort Meade concerning this Memorandum as this was a security problem". In the July 21, 1988 letter, I had been directed by the Agency Commander to please call if I had any questions. When I pursued the question of where it stated that a personnel regulation concerning a step increase was a security problem, my Reviewer responded, "such an attempt at defining regulations concerning discussions that could/should not be discussed was not possible in the Berlin environment". This incident as well as the January 17, 1989 Minimally Acceptable rating with the Not Met security practices element for personal long distance telephone calls, comprised the two Agency alleged instances of telephone security, which the Agency failed to substantiate but recorded. Without cause or

justification, both incidents denied me freedom to communicate, because management could not define what I could or should be authorized to discuss on my personal telephone, and with whom. When I again hesitated to sign the Memorandum, my Reviewer stated that he would suspend me for insubordination if I did not sign it immediately, adding that I would not be permitted to leave the room until the Memorandum was signed. After I signed the Memorandum under duress, my Reviewer stated that if I ever talked to MER over the telephone again, "he would go directly to the Berlin Community Commanding General and see that I was removed from Berlin". He concluded the conversation by adding, "I knew that he (ie: the Berlin Commanding General) could and would do it, too!" The institution of restraint, coercion and duress resulting from my session

with my Reviewer at his office was documented by me and is contained in an initial two page and an expanded three page letter, both issued on May 4, 1989.

In my rebuttal statement, which specifically addressed only the issue of withholding the within grade step increase, dated May 17, 1989, addressed to my Rater with copies provided to Reviewer, Endorser and the Agency MER, I requested reconsideration based on the provisions contained in Agency issued Memorandum, Subject: Procedures for Granting/Withholding Within Grade Increases, IASV-P-CM, dated 15 Feb 89. Per the regulation: there was no substantiation or justification for withholding the increase; the notification was made considerably after the prescribed date; the statement does not follow regulation requirements; listed supervisory responsibilities were

not met; I was not informed of right to serve reconsideration; restraint, coercion and duress were instituted during presentation; provisions of the regulation have been ignored and/or administratively mishandled.

On May 26, 1989 I wrote a follow-up letter, to a May 19, 1989 telephone call made from Chicago, IL, consisting of a request for assistance and review of personnel actions to the Command's Office of the Inspector General (IG), U.S. Army Intelligence and Security Command. In a response letter to me, dated June 26, 1989 (sic) (I have the envelope which is post marked July 31, 1989) from the IG, page 2, paragraph(s) b1 + 2, the IG specifically responded concerning the within grade step increase: "A determination of level of competence should be made as of January 12, 1989. Since your performance as of

January 17, 1989 had now been determined to have been Fully Successful, this office can see no regulatory reason why that determination should not be favorable IAW (in accordance with) the FPM (Federal Personnel Manual)".

Per regulation, step increase performance notice was required as of January 12, 1989. Without documentation or substantiation, the Agency should, of its' own accord, have issued the step increase on March 12, 1989. There was no justification for "Withholding" the step increase after the regulation designated date of issuance. Nor was there justification for the methods of duress used to implement the step increase Withholding, as I documented in my May 4, 1989 letter. The May 4, 1989 notification issued by my Reviewer was my first and only notification of an alleged element deficiency. There was no

other documented deficiency. There was no justification for initially issuing a sixty day performance period, May 4 to July 4, 1989 to improve the one element, and then changing the performance standards under which that one element was be rated on May 31, 1989. There was no substantiation for claiming that I failed to meet one specific element in the May 4, 1989 Memorandum issued by the Reviewer, then deceptively threatening unsatisfactory performance by issuing a completely changed basis of Withholding to yet another set of unsubstantiated elements issued under another performance plan in a July 13, 1989 Memorandum issued by my Rater. There was no justification for ignoring my letter dated May 17, 1989, Subject: Request for Reconsideration of Within Grade Increase, which specifically addressed the Agency's own regulation of

requirements for within grade increases. There is no justification for my Rater signing any performance determination dated May 30, 1989 which was initiated less then thirty days earlier and when he had been on Temporary Duty in the United States the last half of April and the first half of May 1989 to attend schooling and to take two weeks home leave. Even with unsubstantiated input from the Rater, I was still given less then thirty days to improve an alleged unsatisfactory performance element. There was absolutely no justification for delaying the step increase after the Agency Commander, on May 30, 1989, upgraded all elements to "Met", including the element of security practices, comprising the now Fully Successful January 17, 1989 rating. There was no justification for ignoring the IG decision letter dated June 26,

1989. Or my reissuance of the contents of that IG letter in my August 15, 1989 request. Or my having to make a third request on November 2, 1989 for IG action, after the Agency on October 16, 1989 again refused issuance of the step increase. An IG response, dated December 20, 1989, reordered the step increase, which was finally issued by the Agency in January 1990.

I formally resigned on August 26, 1989. Some seven weeks later, in the letter dated October 16, 1989 from the Civilian Personnel Officer (CPO) which denied my step increase, I was notified for the first time of my fourth rating for the year. The letter specifically stated: "As a result of your (May 26, 1989) request to the IG concerning the withholding of your within grade increase, your supervisor was requested to decide on your acceptable level of

competence as of May 30, 1989. A "performance appraisal" was completed as of that date and your performance was "Unsatisfactory". Regulations provide administrative channels for an employee to request redetermination of withholding within grade increases, however, since you are no longer a Department of the Army employee, these administrative avenues are not available to you".

This deceptively issued, adverse unsatisfactory personnel rating action was backdated to occur well within my period of employment and was accomplished through an Agency induced environment consisting of coercion, time pressure, intimidation, misinformation and deception. Inasmuch as I was not willing to accept an unjustified unsatisfactory, a minimally acceptable or a qualified fully successful rating,

there was no reason for me to accept such an adverse, involuntary and unacceptable action as this, especially since I was made knowledgeable only after my resignation. As documented, there was more than ample justification for having the Agency issue the step increase, without the Agency having to unilaterally resort to initiating and implementing an unjustified annual performance rating. And let there be no doubt about it, clearly the Agency did in fact issue an unsatisfactory performance rating.

Withholding of a within grade step increase is by regulation premised on the correct application of procedure in determining the employees acceptable level of competence (ALOC) for a given element(s). The premise for any Withholding action must be defined in accordance with the regulations and

elements which need be specifically evaluated and explained. An employee whose work is judged to be at an ALOC is entitled to a periodic step increase. An employee whose performance in any "critical element" is less than satisfactory is not considered to be performing at an ALOC. Under the instance of the August 26, 1988 performance standards, the element security practices was a "non critical" element. Nor do I see anything specific about element evaluation or explanation in either the Agency's or the IG's letters.

A performance appraisal, however, that was issued with a Part VI, Summary Rating Level, as was specifically done in this instance with "Unsatisfactory", is no longer a level of competence, but an actual annual performance rating. There is no justification for this

induced action. With an unsatisfactory summary adjectival rating action, the consequence is dismissal from service. This is considerably different than determining only the level of competence of "Met", "Not Met" or "Exceeded" for each of the critical performance element(s) in question for Withholding a step increase.

The intent of this Agency induced personnel rating action was then confirmed in the terms used by the IG in his December 20, 1989 response letter, which stated that "the unsatisfactory rating" to which I inquired is a "special rating" prepared by my supervisor (Rater) at the Agency's request, and "was prepared and signed effective August 25, 1989 (which was my last day of employment) and determined as of May 30, 1989". This adverse personnel rating action situation is so

unsubstantiated, illegal and unprofessional it is unbelievable that both the Agency and the IG documented and confirmed its' creation and implementation. Additionally, this personnel action is both deceptive and coercive in that no personnel rating action can by regulation be prepared, signed or issued on August 25, 1989, as that rating would fall under the May 31, 1989 performance standards. Inasmuch as I had not been under the new standards the required minimum of 90 days, technically I can not be rated. Nor can a performance rating be backdated to May 30, 1989 or be substantiated as the performance standards applicable then were technically determined to be unclear and unmeasurable, per the MER Memorandum, Subject: Accounting of Actions dated June 8, 1989 paragraph 2d.

The IG, who was ever so specific in

his June 26, 1989 response letter concerning the Withholding step increase action simply side steps and dismissed the Agency's issuance of the unsatisfactory personnel rating action dated May 30, 1989. I do not accept this explanation or resolution. Both the Agency and the IG knew the rating was improperly obtained and deceptively issued. I want these facts acknowledged. As a consequence, the rating constituted a deceptive resignation, by letting me think I had resigned with a Fully Successful, as was confirmed in an Agency CPO letter, dated September 22, 1989. There were so many coercive personnel actions involved that its' issuance can only be ill intentioned. How convenient too, that the Agency Commander's attitude expressed in his May 30, 1989 letter, which referenced: "a decided dissatisfaction by management

with your performance" so accurately reflected the Agency's inability to compromise on any fair or just resolution of personnel actions taken against me.

As far as I know the May 30, 1989 performance appraisal still is a matter of official record at the Agency. In this instance, all implementing actions were documented by the Agency and confirmed by the IG to have been backdated to occur prior to my formal resignation on August 26, 1989, making them effective during my employment. I was not notified of this travesty until after my formal resignation. The October 16, 1989 Agency CPO notification also denied me redress. The IG acknowledged; the rating's existence, that this induced personnel action was unilaterally implemented by the Command and that it was involuntarily applied to

me. I am not satisfied with, nor do I accept the December 20, 1989 IG Command explanation or assumed resolution that although the unsatisfactory rating had been prepared and signed, it is not in my personnel file. Even if this rating is not in my file this rating action, like numerous precedent actions the Agency implemented, is indicative of the application of deceptive and coercive attitudes and intentions inherent in numerous past Agency induced actions. Actions which could be referenced by my rating chain to other employers as being my "documented performance", as I believe has already been the case once. I expect full and fair vindication for this and all coercive unwarranted, unsubstantiated and unjustified personnel action issues perpetrated by the Agency. Many of these personnel actions were deemed grievable by the

Department of the Army (DA) Inspector General (IG) in his response letter, dated May 1, 1990, which referred me for the first time outside of the Command review channels for resolution.

Aside from the post employment step increase that was withheld, and the post employment notification of a backdated unsatisfactory rating, there is also the Agency's post employment failure to resolve a still pending medical claim. At the time of my resignation, the Agency was required to cancel certain benefits, one of which was my health insurance. Before resigning in August 1989, I submitted a number of claims with my health benefit plan. As early as February 1990, Mail Handlers Benefit Plan (MHBP) contacted my wife, who was still an employee at the time, and informed her that she and I had dual enrollment with MHBP. Inasmuch as her

enrollment was of longer duration, my medical coverage needed to be retroactively canceled. That could only be done by having my former employing Agency directly contact the MHBP. This was not something I could do. I was assured by both the Agency on May 3, 1990 and by the IG on June 4, 1990 that the policy had been canceled. Settlement claims are still pending the required action by my former employing Agency.

ARGUMENT FOR AMPLIFYING REASONS FOR ALLOWANCE OF A WRIT OF CERTIORARI

In reviewing the administrative record, the court is not confronted with a mere legal issue in the usual sense. In the administrative record upon which the court acted in this case there was a genuine issue of material fact as to coercion. Unless it can be ascertained that the court reached its conclusion

under the proper standard of review, summary judgment should not be affirmed and the case, at the least, should be remanded. Because of the unreasonably long duration of the personnel actions without prospect of fair or just resolution, as well as the documented presence of coercion and duress throughout the entire situation, the unsubstantiated Agency induced personnel actions and statements comprised sufficient duress to cause the employee to resort to the only alternative available, coerced involuntary resignation. A violation by an Agency of its own regulations voids an action taken by it against an employee. The conduct of the Agency, not the conduct of the employee, is the issue. The Court has no basis for holding there was no genuine issue of administrative coercive and suggestive fact.

CONCLUSION:

The Agency induced environment of emotional, mental and physical duress to which I had been involuntarily subjected, which I previously expressed in my emotionally distressed attempt(s) at documenting coercion, precluded me from raising a non-frivolous allegation of involuntariness, no matter what the facts presented. But this does not alter the facts of the case. The U.S. Army Agency and that Command's Inspector General were knowledgeable of all incidents and personnel actions. Yet, through what can only be described as repeated instances of intentional lack of control, review and oversight for a period lasting longer then one year the duress, deception and coercive intent of harassing personnel actions and statements were permitted to be unjustly

institutionalized by the local, administrative and internal review levels of that Command. A year went by without response or acknowledgment to any of my numerous requests, both written and verbal, for assistance, guidance and information from the Agency, which I was promised and which I required to properly and adequately respond with in a timely manner to the repeated instances of induced abusive personnel actions. I have previously submitted, to both the Board and Circuit Court all referenced documentation supporting my position in how these coercive personnel actions were initiated and then reapplied in second, third and even fourth consecutive and sequential ratings and numerous co-generated personnel actions. The majority of these personnel actions never satisfactorily resolved any of the

preceding personnel action(s), while permitting management to induce yet another personnel action to be used to fabricate additional unwarranted, unsubstantiated and unjustified personnel actions of duress. These actions were then determined, by the Agency Commander, to be unjustly coercive, when he stated that correct regulatory procedures were not followed. Most of the other personnel actions were determined to be coercive by Agency management since they were in need of revision because clarity and measurability, two fundamental criteria, were absent from the improperly issued and applied standards. Then new standards were again improperly reapplied by management. Additional personnel actions were issued within ninety days under yet a third set of performance standards issued that same

year, making any personnel actions unjustified by regulation and just blatantly harassing. For more then one year, these actions constituted coercion and duress that did not simply equate to unfortunate circumstances. Nor can the resulting duress of the actions or the fact of their repetitiveness be dismissed, especially after the Agency's own acknowledgment of coercion in implementation. As a consequence, the Agency's actions must be precluded from being considered as merely mismanaged. Management must be responsible and accountable for its' actions. Never was there any notable change in the Agency's improper application of personnel procedure(s), even after repeated instances over an extended period of time which clearly and convincingly showed management that changes in the manner and procedure of application was

not only necessary but required. I have documented the Agency's inability to substantiate their own actions and the consequent institution of a coercive environment before, during and notably after formalization of my resignation. A harassing situation that existed for more then one year prior to my formal resignation and then continued for almost one year subsequent to submission of my resignation. Additionally, the intent of these actions was clearly conveyed by all levels of management through statements; asserting, suggesting, discussing or otherwise prompting and coercing my resignation in situations of duress. Whether an employee's action is voluntary or involuntary is determined not by the form of the action but by the circumstances that produced it. How long and how much must the employee

accept and endure in an openly hostile and coercive employment environment with a management that institutes an ever continuing unwarranted and unresolving adverse employment situation is the question. Such employment is especially unjust since it is documented to be premised on repeated incidents of fabrication, documented to be implemented without substantiation and documented to be induced by the Agency without benefit of fair, reasonable or just management, assistance, guidance, information or timely resolution being provided to the employee. Nor was there reason for me to believe there was any other viable or acceptable Agency alternative to the working environment that I had come to expect and was clearly and convincingly established both with and within that Command and Agency. This attitude and position was

supported by my having worked some sixteen years with the U.S. Army, the five formal requests for reassignment I made during my last year of employment as well as the continued personnel actions that were perpetrated by the Agency without either cause, justification, my knowledge or resolution even after impropriety was determined. The illegality and consequent impact of coercion, duress and suggestion inherent in these same Agency induced personnel actions and statements must be reviewed. My former employing Agency should be held responsible and accountable for their application of the induced environment of adverse unwarranted, unsubstantiated and unjustified coercive and harassing personnel actions and statements unjustly perpetrated against me which caused me to involuntarily resign.

UNITED STATES OF AMERICA

MERIT SYSTEM PROTECTION BOARD

WASHINGTON REGIONAL OFFICE

J. HAROLD KADLEC DOCKET NUMBER

Appellant DC07529010412

v.

DEPARTMENT OF THE ARMY

Agency DATE: Aug 6, 1990

J. Harold Kadlec, Evanston, Illinois, pro se.

Robert W. Garrett Jr., Esquire, Fort Belvoir, Virginia, for the Agency.

BEFORE

Joseph E. Clancy

Administrative Judge

INITIAL DECISION

Appellant filed an appeal in May of 1990 concerning his alleged involuntary resignation from the position of Intelligence Operations Specialist, GS 132-12, effective August 26, 1989. For the reasons set forth below, the appeal

is DISMISSED.

The record reflects that appellant was formerly employed in Berlin, Germany. By letter dated July 19, 1989, appellant submitted his resignation to be effective "with the close of business, August 25, 1989." Appellant noted that he was resigning "to return to the United States and resume (his) formal education."

A resignation is presumed to be a voluntary action, and normally does not constitute a matter appealable to the Board. See 5 C.F.R. para 752.401 (b)(9); Myslik v. Veterans Administration, 2 M.S.P.R. 69, 71 (1980). A resignation, however, which is obtained by coercion, time pressure, intimidation, misinformation or deception is involuntary, and tandamount to an adverse action. See Scharf v. Department

of the Air Force, 710 F.2d 1572, 1574 (Fed. Cir. 1983). If an appellant sets forth a non-frivolous allegation of involuntariness, a hearing on the issue of jurisdiction is warranted. See Fletcher v. United States Postal Service, 39 M.S.P.R. 380, 385 (1989).

In the instant case, appellant asserted that his resignation was involuntary because the agency had created, and failed to timely resolve, a number of grievable issues concerning his employment, and had subjected him to a prolonged period of harassment. Appellant asserted that the agency's harassment affected his health and home life, and caused him to submit his resignation.

Appellant's proposition that the agency forced him to resign is not supported by the facts asserted by him

on appeal. He has set forth no facts which, if true, would warrant a finding that his resignation was coerced, or otherwise improperly obtained by the agency. In this regard, the record reflects that appellant utilized internal agency procedures to address several personnel matters, both before and subsequent to his resignation. He has not asserted, nor even suggested, that his resignation was discussed with, or otherwise prompted by, any agency personnel. There is simply no indication that appellant's resignation, submitted some five weeks in advance of its effective date, was anything other than appellant's own idea. (1 - Footnote)

I find that appellant has failed to show that his resignation was due to any duress or coercion by the agency. The fact that an employee may be faced with

unpleasant alternatives, however, does not vitiate the voluntariness of the employee's selection of one of the said alternatives. See Christie v. United States 518 F.2d 584, 587 (Ct.Cl. 1975). In the instant case, I find that any pressure which appellant felt to resign was an unfortunate function of his circumstances.

In summary, I find that appellant has failed to prove that his resignation was involuntary. See Dumas v. Merit Systems Protection Board, 789 F.2d 892, 894 (Fed. Cir. 1986). I find that appellant's resignation was indeed voluntary, and did not constitute a matter appealable to the Board. See Schultz v. United States Navy 810 F.2d 1133, 1136 (Fed.Cir. 1987). Appellant has therefore failed to meet his burden of proof as to the issue of

jurisdiction. See 5 C.F.R. para 1201.56 (a)(2)(i). In light of the foregoing, I will make no finding as to the timeliness of the appeal.

DECISION

This appeal is DISMISSED.

/s/
For the Board: Joseph E. Clancy
Administrative Judge

(1) Appellant recently submitted a Motion to Compel discovery. I found nothing in said motion, however, which would aid appellant in meeting threshold burden of proof regarding jurisdiction, i.e. the setting forth of a non-frivolous allegation of involuntariness. See Fletcher v. United States Postal Service, 39 M.S.P.R. at 384.

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

J. HAROLD KADLEC DOCKET NUMBER

Appellant DC07529010412

v.

DEPARTMENT OF THE ARMY DATE: Dec 12, 1990
Agency

J. Harold Kadlec, Evanston, Illinois, pro se.

Robert W. Garrett, Jr., Esquire, Fort Belvoir, Virginia, for the Agency.

BEFORE

Daniel R. Levinson, Chairman

Antonio C. Amador, Vice Chairman

Jessica L. Parks, Member

ORDER

After full consideration, we DENY the appellant's petition for review of the initial decision issued on August 6, 1990, because it does not meet the criteria for review set forth at 5 C.F.R. para 1201.115. This is the Board's final order in this appeal. The

initial decision in this appeal is now final. 5 C.F.R. para 1201.113 (b).

NOTICE TO APPELLANT

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. See 5 U.S.C. para 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. See 5 U.S.C. para 7703 (b)(1).

/s/
FOR THE BOARD: Robert E. Taylor
Clerk of the Board

Washington, D.C.

United States Court of Appeals

for the Federal Circuit

91-3140

J. HAROLD KADLEC
Petitioner

v.

DEPARTMENT OF THE ARMY
Respondent

DECIDED: June 12, 1991

Before MAYER, Circuit Judge, COWEN, Senior Circuit Judge, and CLEVENGER, Circuit Judge

PER CURIAM

DECISION

The final decision of the Merit Systems Protection Board is Docket No. DC07529010412 dismissing J. Harold Kadlec's petition for lack of jurisdiction is affirmed

OPINION

Substantial evidence supports the board's determination that there was no

adverse action against Kadlec because the unsatisfactory performance appraisals and allegedly imperfect management activities preceding his resignation were not coercive. See 5 U.S.C. para 7703 (c) (1988). His supervisors' attempts to counsel Kadlec about improving his work were ordinary management activities intended to give him the opportunity to bring his performance up to the expected standard, not harassment. A resignation is presumed voluntary, Cruz v. Department of the Navy ____ F.2d ___, ___ (Fed.Cir. 1991), and Kadlec's assertions are insufficient to rebut the presumption. Because the board's jurisdiction is limited to cases involving an adverse agency action, see 5 U.S.C. para 7512 (1980), and does not extend to an action taken voluntarily by an employee, 5

U.S.C. para 752.401 (b)(9) (1991), the board correctly concluded that it lacked jurisdiction.

(no closing)

United States Court of Appeals
for the Federal Circuit

91-3140

J. HAROLD KADLEC,
Petitioner,

v.

DEPARTMENT OF THE ARMY,
Respondent.

JUDGMENT

ON APPEAL from the Merit Systems Protection Board

in CASE NO(S) DC07529010412

This CAUSE having been heard and considered is ORDERED and ADJUDGED:

AFFIRMED

ENTERED BY ORDER OF THE COURT

DATED: JUN 12, 1991

/s/
Francis X. Gindhard, Clerk

ISSUED AS A MANDATE: July 3, 1991